No. 9892

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

LOIS ROGERS,

Appellee.

APPELLEE'S ANSWERING BRIEF

DOUGHERTY & CHANDLER,
M. J. DOUGHERTY,
JOHN FRANCIS CONNOR,
516-19 Heard Bldg.,
Phoenix, Arizona,
Attorneys for Appellee.

TOPICAL INDEX

TABLE OF AUTHORITIES

TEXTS

STATUTES

No. 9892

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

LOIS ROGERS,

Appellee.

APPELLEE'S ANSWERING BRIEF

Statement of Pleadings and Facts disclosing Basis for Jurisdiction.

Appellee accepts Appellant's Statement of Pleadings and Facts disclosing basis for jurisdiction.

APPELLANT'S STATEMENT OF THE CASE

Counsel for Appellee is unable to accept Appellant's Statement of the Case as set forth in their opening brief

for the reason that such statement is fragmentary, incomplete, does not present succinctly the questions involved, or the manner in which they are raised, and does not constitute a sufficient abstract or correct statement of the questions involved, or the manner in which they are raised, and, therefore, with no disrespect to opposing counsel, feels obliged to present their own case statement.

APPELLEE'S STATEMENT OF THE CASE

(References in Statement of the Case are to the Transcript of Record)

1. Defendant's Arizona Office Personnel.

(a) Mr. Arthur F. Lindberg at all times herein involved, was Chief Executive and General Manager of the Arizona Office of the New York Life Insurance Company - Defendant and Appellant in this case; and as such, had general direction and control over the company's business, (Mr. Lindberg Tr. 81-85): Mr. D. F. Caskey, during the same period, acted as Cashier of the company in the Phoenix Office, and as such Cashier, received and mailed to the respective agents or insured, life insurance policies issued by the company in the State of Arizona, (Tr. 79-81).

2. Defendant's Local Office Customs, Routine and Practice.

(a) The insurance company has in its local office a printed "Pamphlet" relating to policies, entitled "Instructions to Agents", concerning various practices, (Def's Ex. "F", Tr. 134), but there is no proof that such Pamphlet or any other prepared office regulation respecting the issues of this case, were ever given by any authorized company official, to Rogers, the insured, (Tr. 133); or that the

provisions of the "Pamphlet" are observed in actual office practice.

(b) Under the actual routine practices of the company, applications for policies are solicited by, and then sent by salesmen, to the local Phoenix Office, from which they are regularly forwarded to the New York Home Office, which in turn, rejects or accepts the application and issues or refuses the insurance policy. When the application is accepted the policy is sent to the Phoenix Office, and the Phoenix Office either delivers the policy direct to the insured, or to the agent who has solicited the insured, (Tr. 83, 103-106, 143, 144).

3. Delivery of Policies Under Company Credit System.

(a) Where the initial premium has not already been collected at the time of signing the application, the agent collects such initial premium, and in due time usually remits the same to the Phoenix Office; whereupon, he is credited on the local office account books, and is chargeable with any cash premiums retained.

(b) Life insurance policy recitals suggest that the initial premiums must be paid in cash before the delivery of the policy, but in actual practice, the provision is customarily and usually disregarded, and there is set up by common practice an indirect policy Credit Arrangement. Under this arrangement the soliciting agent may sell policies on a time basis - accepting promissory notes or other evidence of indebtedness for the initial premium, and deliver the policy to the insured without the payment of the initial premium in cash, (Tr. 143-144, 158).

(c) Out of the first and subsequent accruing premiums, the selling agent retains or is credited with a cer-

tain commission or stipend for his services. The agent usually collects these premium notes as they mature and remits to the branch office or retains the collection - dependent upon the status of his credit account or arrangement with the local office of the company. The initial payment promissory notes, represent the amount of the initial premiums due on the appertaining policy, plus the commission due to the salesman, (Tr. 157-158).

4. Employment of Rogers as Salesman.

(a) October 28, 1939, Zeno A. Rogers, in his lifetime the husband of Lois Rogers, the Plaintiff and Appellee herein, was employed in the capacity of salesman by the Defendant Company, acting in this regard, by its Arizona Branch Manager, Mr. Lindberg, (Tr. 83-84).

(b) Pending the receipt of the earnings, it was necessary for Mr. Rogers, then in straightened circumstances, to borrow operating expense money; and an arrangement was made between Mr. Lindberg for the New York Life Insurance Company, Zeno A. Rogers and one Stanley Clem, of Phoenix, whereby the said Clem, loaned Rogers the sum of Seventy-Five Dollars ($75.00), to be thereafter repaid to Clem out of commissions or premiums to be subsequently earned by Rogers through insurance policy sales; and which arrangement, was participated in by Mr. Lindberg, for the insurance company, Mr. Rogers and Mr. Clem, (Tr. 174-177; 185; Pltf's Ex. in Evidence No. 5 Tr. 177).

5. Rogers' Policy Sales and Commissions.

(a) Immediately upon the making of employment arrangements (October 28, 1939), the insured Z. A. Rogers, entered upon his work and duties as sales agent

for the company in the southern part of the State, and at a considerable distance from the local office of the company at Phoenix. He continued in such employment as sales agent until his death.

(b) The company kept no record of transactions between it and Zeno A. Rogers during the period of his employment - nor until February 24, 1940, and after his death. It then set up and began keeping an account for him, (Tr. 147).

(c) The volume of his policy sales compared very favorably with those of the larger production agents of the company, (Tr. 59-61; 75-76; Pltf's Ex. No. 1, Tr. 62).

(d) Altogether, Mr. Rogers before his death, sold some thirty-nine (39) policies of which some fifteen (15) policies were subsequently cancelled for non-payment of the first premium promissory note given therefor, and twenty-four (24) were retained in good standing, (Tr. 149, 150).

(e) The record further shows that where Mr. Rogers made sales of policies and took promissory notes of the policy holders for the initial premium, these notes were seized on Rogers' death, and taken by Mr. Lindberg to the Phoenix Office of the company, (Tr. 156-161; 191-194), and of these notes, the company collected thereafter, some $404.87 - applicable, as per credit arrangements (Sec. 4, Par. (b), ante; Sec. 6, Par. (a), infra), and then upon the various policies Rogers had sold, (Tr. 151). The insurance company office at Phoenix continued to collect on these promissory notes at least, until December, 1940, and returned some of the notes uncollected, to Mrs. Rogers, widow of the insured deceased, (Tr. 191-195).

6. Rogers' Policy Application and Waivers.

(a) About December 1, 1939, and during his employment as salesman the deceased, Zeno A. Rogers, began negotiations for the application or taking out of a New York Life Insurance Company policy on his own life. As he had previously made arrangements between himself, Mr. Lindberg and Mr. Clem whereby the latter, Mr. Clem, was to be repaid the $75.00 which he had loaned to Rogers for expense money, out of the first commissions earned by Rogers, (See Sec. 4, Par. (b) ante, and as under the new arrangement then being made for the purchase of his own policy on credit, it was proposed that Mr. Clem subordinate his prior claim against commissions earned, in order that the insurance company should receive the proceeds of commissions earned by Rogers. Accordingly, Rogers communicated with Mr. Clem regarding this matter, and Mr. Clem in turn conferred with Mr. Lindberg concerning the subordination of Mr. Clem's prior claim, (Tr. 180-182).

(b) Under the new arrangement agreed upon between Rogers, Clem and Lindberg, it was arranged that Mr. Clem's claim should be subordinated until the initial premium on Rogers' policy had been paid to the company, (Tr. 171-182; 185-186).

(c) Thereupon, about December 7th of that year, and during his employment as salesman, Zeno A. Rogers, applied for an insurance policy on his own life, in the sum of $2,000.00 or double that amount ($4,000.00) in the event of death from accidental means other than accidents growing out of or connected with the use of or operation of aircraft - aviation accidents, (Pltf's Ex. No. 3, Tr. 86), and naming as beneficiary under the policy, his wife, Lois

W. Rogers, Plaintiff in this case; and in connection therewith, he executed appropriate Applications and Waivers, (Pltf's Ex. No. 3, (Application), Tr. 92 to 98).

(d) In his application, Rogers, the insured, also agreed that any additions or amendments affixed to the policy were ratified and accepted by him, (Pltf's Ex. No. 3, ante, Tr. 95). He also stated therein, that he was not in any wise connected with aviation, and that in the event of aviation accidents, he waived all insurance.

(e) Rogers' application passed through Mr. Caskey's hands in the Phoenix Office, from which it was regularly transmitted to the New York Home Office of the company, (Pltf's Ex. No. 3, ante, Tr. 95, 97-98; 79-80).

7. Issuance and Transmission of Policy by Home Office.

(a) Rogers' application as transmitted from the Phoenix Office, was accepted by the Defendant insurance company at its Home Office in New York, and a policy dated December 19, 1939, was issued as per application. In accordance with the waiver respecting aviation accidents, appearing in Rogers' application already signed by him, there was attached by the company to the original policy transmitted for delivery to Rogers, what is called a "Permanent Aviation Clause Waiver" to which waiver, was affixed the signature of Rogers typed thereon by the company, (Pltf's Ex. No. 3, ante, Tr. 90-91).

(b) In a certain Inter-office *stock* or routine form, accompanying communication, the incidence of a duplicate of the paper designated as "Permanent Aviation Waiver Clause" is mentioned. No such duplicate so far as the record shows, was ever transmitted from the Home to the Arizona Office of the Company; and the de-

fendant admitted on trial that such a paper could not be found, (Tr. 142).

8. Delivery of Rogers' Policy.

(a) The policy was transmitted to, and received by the Arizona Office about December 23, 1939, (Tr. 108). If, in addition to the "Permanent Aviation Clause", paper or rider affixed to the policy, and having thereon Rogers' name, there was a paper or duplicate paper, containing such clause, it nowhere appears from the evidence.

(b) No such paper was ever presented or mentioned to the insured, Zeno A. Rogers, in connection with the delivery of his policy, or otherwise.

c) Negotiations regarding extension of credit to Zeno A. Rogers for first premium took place between, and were conducted by Messrs. Lindberg, Rogers and Clem, - (See Sec. 6, ante), and not with or by Mr. Caskey - (Tr. 152-153), - although he had notice, (Tr. 152-162), of credit in re: Clem loan, (Tr. 162-163).

(d) Mr. Caskey in his official capacity with the insurance company, regarded the acceptance of Rogers' insurance policy with the aviation clause attached, as a waiver of any insurance claims in the event of an accident from aviation; and also regarded the delivery of the policy as a receipt for the payment of the first premium, (Tr. 140, 156).

(e) Rogers' policy was transmitted from the Home Office accompanied by a *stock* or routine printed form of communication. The subject of this circular related to the waiver with respect to aviation accidents. This was the waiver which Rogers had included and signed in his

application, (See Sec. 6, Par. (c), ante). This *stock* communication was designed to govern situations between salesmen and third parties, and was inapplicable in the instant situation, and was an inter-office direction, the subject matter of which was never communicated to or in any wise brought to the attention or knowledge of Rogers; nor was he ever shown nor asked to sign any such waiver or other instrument, (Tr. 129, 215).

(f) Credit arrangements for the payment of the first premium having been previously made, (See Sec. 6, Par. (a), ante), Rogers' insurance policy was regularly mailed to him by Mr. Caskey on or about December 29th, 1939, and in the ordinary course of mail service between the Phoenix Office and the operating headquarters of Rogers, at Wilcox, and received by him at the latter place about January 1st or 2nd, 1940, and it remained in Rogers' possession until the time of his death, (Tr. 79-81).

(g) Under the local office routine, there is sent to salesmen monthly, a statement showing what policies have been delivered to them in the previous month, and upon which document the agent's report information concerning the policies. Such a statement was sent by Mr. Caskey to Mr. Rogers about January 15th, 1940, recalling to Mr. Rogers, among other things, that his own policy had also been delivered to him. In response to this statement sometime after the 20th of January, 1940, Rogers returned such monthly routine report advising, among other things, that he was holding his own policy, (Def's Ex. D - Tr. 125-126).

(h) Thereafter on January 23rd, 1940, and while the credit arrangement for the premium payment between Messrs. Lindberg, Rogers and Clem was in effect, Mr.

Caskey wrote Mr. Rogers asking the latter to return his policy so that the local office might hold it until the premium was paid, (Def's Ex. "E", Tr. 129). This letter in the ordinary course of mail delivery would have reached Mr. Rogers about January 26, 1940, which was the date of his accidental death.

9. Death of Mr. Rogers.

(a) Mr. Rogers, the insured, maintained headquarters at the Page Hotel, Wilcox, Arizona, about 250 miles from the company's Phoenix Office, and in his room were located his papers, documents and personal belongings.

(b) He was fatally injured in an automobile accident at Fort Huachuca, not far from Wilcox, on the evening of January 26, 1940. His injuries, among other things, consisted of cerebral contusions, broken leg and arm, skull fracture and shock, and he was taken unconscious to the Military Hospital at Fort Huachuca immediately after the accident at which place he died on the morning of January 28th, 1940, (Tr. 75-76).

10. Seizure of Zeno A. Rogers' belongings by Defendant Company.

(a) At the time of the death of Rogers, the insured, Mrs. Rogers was at the family home in Phoenix, Arizona, where she was called by telephone by Mr. Lindberg, State Manager of the defendant insurance company, who stated to her that he proposed to go to Willcox, and wanted permission from Mrs. Rogers to enter the hotel room of her deceased husband. She informed him that she would not give such consent, and that she intended to go "down there" and take charge, and informed the hotel manager by telegram, not to permit anyone to enter her deceased husband's room, (Tr. 185).

(b) Mr. Lindberg, however, went to Willcox, entered Rogers' room in the Page Hotel and took therefrom, all papers and documents belonging to the deceased, including his personal correspondence, papers, documents, insurance policy, promissory notes and all other data therein, and brought the same to the office at Phoenix; and the same, except as otherwise shown by the record herein, are still in possession of the defendant company, (Tr. 76-77; 183-185; 198-199).

11. Company's Repudiation of Insurance Contract and Refusal to give Proof Forms to Mrs. Rogers, the Beneficiary.

(a) Mr. Rogers was buried at Phoenix, Arizona, about February 1st, 1940. Immediately thereafter Mrs. Rogers made demand on Mr. Lindberg, as company manager, for her husband's papers, including the insurance policy in which she was named beneficiary. Mr. Lindberg refused to give her the policy or any other papers taken, saying:

> "I had the right because everything in the room pertaining to the company is now the property of the New York Life Insurance Company; therefore, I have the right to take it and I have it", (Tr. 185).

(b) He further stated in answer to her inquiry as to the credit arrangement:

> "Yes, that is the way it was supposed to have been, but unfortunately he died before he was able to pay anything on it".

On Mrs. Rogers' further insistence for the return of the policy, he said: "Well, I can't give it to you", (Tr. 185-186).

(c) Subsequently Mrs. Rogers made further demand upon the company through Mr. Lindberg for the necessary forms to make proof of loss. Mr. Lindberg refused to give the forms stating: "That the company would not pay the policy anyway". Her demand was repeated on two other occasions but on each occasion all responsibility on the part of the company was denied and the forms and payment refused, (Tr. 76-78; 183, 185-186).

(d) Thereafter Mrs. Rogers brought this action.

APPELLEE'S ARGUMENT

(References in argument following are to Sections indicated by numbers, e. g. (1), and Paragraphs indicated by letters (a) as appearing in Appellee's Statement of the Case, ante, except where direct reference to the Transcript is indicated by "Tr. p.....").

ISSUE I

Arguing this issue, counsel quotes from 14 RCL, 895, to the following effect:

> "To be effective the acceptance of an application must be in the very terms offered. Where it is on different terms the contract is not complete until the applicant has signified his acceptance to the new terms".

Appellee concedes the quotation as a correct statement of abstract law with respect to offer and acceptance, but the proposition finds no foundation or application in the facts or record of this case - - - -. Instead the facts and the record conclusively show the inapplicability of the general statement.

Counsel's argument proceeds upon the theory that Rogers applied for one type of policy, and that the company rejected his application, and offered another type, or that

Rogers when so requested, failed to do something which he should have done. *This is not true.* The facts establish the opposite. The record discloses that Rogers applied for an ordinary life policy with double indemnity features for accidental death, except in case of accidents arising from aviation, and he expressly waived all insurance rights or benefits in case of accidental death from aviation causes.

The company accepted his application and waiver with a direct and patent recognition of his waiver, and then affixed to his policy, with his name typed thereon, a condition or rider wherein death benefits from aviation accidents, were expressly waived, (App. St. Sec. 6, Par. (c); Sec. 7, Par. (a), and Rogers' acceptance of the policy in accordance with the Company's long established custom and practice, was his acknowledgment of his acceptance of this policy with the waiver attached, and an express acceptance of the condition and waiver, (App. St. Sec. 8, Par. (d)). Rogers had already signed a waiver of the right to claim insurance benefits in case of accidental death arising from aviation accidents (App. St. Sec. 6, Prs. (d) & (e)) - His signing another paper for the same purpose could add nothing to the exemption of the Company. What more could he do? There was also attached to his policy the same waiver with his name typed thereon by the Company, and in accepting his policy, he would obviously accept the condition and confirm the waiver. What more could be required?

It will be conceded that the cases cited by counsel under this issue are consistent with, and support the abstract statement from Ruling Case Law, and it would serve no useful purpose to analyze them, because obviously and for like reasons, they are not in point. They apply only, to a

state of facts actually involving "offer and acceptance".

In the instant case, the Company issued Rogers' policy on his application, which was incorporated in, became part of his policy, and as such contained *precisely the waiver in question* and in recognition of this fact, the Company attached also as a part of the policy issued, a duplicate of the very waiver involved, and typed thereon Rogers' signature of acceptance - - - which signature and acceptance, it necessarily follows, implied consent to the condition.

It is significant that this so-called "Permanent Aviation Clause" discussed under this Issue, first became apparent or received any consideration on the part of the defendant on the trial of this case. Its existence was never established, (App. Sec. 7, Par. (b), ante). In no conversation between Caskey and Lindberg, or between either of them and Rogers, was it ever produced, suggested or mentioned - Even in Caskey's letter to Rogers about January 23, 1940, when the occasion and the circumstances in good faith required him to then mention it - if ever, there was not even an intimation of the existence of such a paper or the necessity of any action on the part of Rogers with reference thereto, (App. St., Sec. 8, Par. (h), ante). From all of these facts and circumstances and the attitude and reaction of Messrs. Lindberg and Caskey in the premises, it is eminently fair to conclude that until Mrs. Rogers brought this suit, these two Company representatives considered the waiver feature fully closed, and the matter of no importance, (App. of Facts, Sec. 8, Par. (d), ante).

When this action was brought, the question of defense first confronted these two Company representatives, and

as they had previously only asserted as justification for the repudiation of the Company policy, the alleged "premature death" of Rogers, as a sole defense against the claim of Mrs. Rogers, it is patently evident that then, for the first time, Mr. Caskey grasped at the possible solace which might be drawn from this *stock* Inter-office communication, and Mr. Lindberg adopted his "line". This, we respectfully submit is not an idle speculation, but is amply supported by the record - Mr. Lindberg did not tell Mrs. Rogers in his conversation with her that her husband had failed to sign any waiver or any other required paper; he only said the Company would not honor the policy or pay the same because her husband had died before he had performed the credit arrangement under which the policy had been delivered to him, (App. Sec. 11, Pars. (a) to (e) incl., ante).

Certainly these facts and circumstances will not sustain counsel's argument of an inconsistency between an offer and acceptance as attempted under this Issue.

If any legal questions are posed by the facts of this case, they are:

Where an applicant has signed and delivered an application for an insurance policy, which application is to become a part of the policy and which contains all Company required waivers; and an insurance policy is issued thereon incorporating such application and waiver, and in addition the exact words used are embraced in a paper likewise incorporated therein, and forming part of the policy to which the Company signs the applicant's name with intention that the policy will be accepted in the form prepared by it - - Is there a further legal essential, that there should be a repetition of this signature and waiver before the policy becomes effective?

It is also to be remembered that this alleged duplicate paper or waiver - or whatever it may be called, was never presented or mentioned to Rogers; that his signature thereto, was never requested; and that it is entirely immaterial.

Are his rights to be prejudiced by such an Inter-office Direction of which he had no knowledge whatever?

We submit that the foregoing questions, - which really comprehend the facts of this case, must both be answered in the negative; and our contention in this regard, is amply supported by the following authorities:

The case of *Bloom v. Pacific Mutual Life Insurance Co.*, (Calif. 1927, 259 Pac. 496) is of interest because it is based upon a fact situation analogous to the matter herein. The question as to the obligation of the insured to sign an additional application and a certificate of health sent along to him with the policy was presented. The Court in rejecting the defendant's contention that such documents should have been signed to make the insurance contract valid, stated at page 500, Col. 2:

> "This question was presented and decided adversely to the contention of the Appellant in the case of *Kahn v. Royal Indemnity Co.*, 39 Cal. App. 180, 178 P. 331. Hearing in that case was denied by the Supreme Court. There the policy in question read as follows:
>
> > "This policy with a copy of the application therefor signed by the insured, and such other papers as may be attached to or indorsed hereon shall constitute the entire contract between the company and the insured."

"The application was not signed by the insured, and such failure was held immaterial. The policies with which we have to do read as follows:

> "In consideration of the application for this policy, a copy of which is attached hereto and made a part hereof," etc.

"The transcript shows, accepting the testimony of Stillman, that typewritten copies of Bloom's application, with Bloom's name typewritten therein in the place where ordinarily the signature of the applicant would be found, accompanied the policies, and under the case which we have cited and the authorities there referred to, the application became and was a part of each policy as fully to all intents and purposes as though actually signed by Bloom".

In view of the facts, as presented, it was unnecessary for Rogers to exercise any overt act to indicate his assent to the aviation waiver clause.

Abstracting from our contention that the failure to sign such waiver clause was immaterial, we assert that the facts permit the implication that the acceptance of the policy was also an acceptance of the "Permanent Aviation Waiver".

Appleman on Insurance Law & Practice, Vol. 1, Page 174, Section 172, supports our contention as follows:

> "* * * the courts are quite willing to imply acceptance where the terms of the contract are clear, and it was apparent it would have been accepted" (Note 10, citing Peoples Life Insurance Co. vs. Whiteside, 94 Fed., (2nd) 409).

The case of *New York Life Insurance Co. vs. Fletcher,*

117 U. S. 519, 29 L. Ed., 934, cited by Appellant in it's Opening Brief, is further authority for our contention that no overt act was necessary for Rogers to indicate his acceptance of the policy.

We submit that Appellant's statements of law under Issue and Argument No. 1, are correct as abstract statements of law, but they are inapplicable to the fact situation here presented. The facts in the instant case show a meeting of the minds of the contracting parties for the reason that the policy as issued embodied all the essential terms of the contract as proposed and assented to in Rogers' application. His failure to sign the Permanent Aviation Clause was immaterial; he would have agreed to nothing thereby that he had not already assented to in his application.

It will be further noted that the facts in the *Morford* case cited by Appellant, are entirely different. The insured in that case, never received or had possession of the policy. Changes had been made by the Company and the policy was different than requested by the insured. Obviously, if the policy never reached the insured, and if he never even heard of the changes, he was precluded from assenting to or signifying consent to what really was a counter-offer.

ISSUE II

This is also a "feigned" issue—as are its appertaining corollaries (a), (b), (c) and (d). What was said of the inapplicability and lack of pertinency concerning the previous "Issue I", applies with equal force as to this Issue II—Neither bear any reasonable relation to the facts in this case.

To state as an "Issue" as counsel have done, that "Le-

gal delivery of policy to Rogers was essential to a consummation of insurance contract", and as corollaries thereof, that "delivery was a condition precedent, to contract"; that if "appellant delivered the policy to Rogers through inadvertence or mistake", or that delivery to him in a representative capacity, might not be delivery in an individual capacity; or again, that "there can be no constructive delivery of a policy when further acts are required of applicant" - is but to state a truism.

We may well concede the propriety of these abstract propositions of law - We have no quarrel with them, or with the authorities stated in support thereof; but these abstract propositions do not pertinently arise from the facts—There is nothing in the record in this case, that will in any wise indicate the pertinency of these obvious rules of law. Sympathetically viewed, we assume Counsel intended to submit an issue of law *arising from the record,* and asking counsel's indulgence, we interpret such a proposition to be;

No Rights can be Predicted by the Plaintiff, on Possession of Insurance Policy by Rogers, because:

(a) He failed or refused to perform some required acts, and for that reason, there could be no constructive delivery of the policy.

(b) It was sent through inadvertence and mistake.

(c) It was sent to him in his representative capacity.

We will attempt to meet counsel's argument with respect to this Issue as formulated.

(a). Alleged non-performance by Rogers

The facts and record relating to waiver of accidents arising from aviation, were fully abstracted, ante, (App. St. Sec. 6, Pars. (c) & (d); and Sec. 8, Pars. (a), (b) & (e)).

These sections and paragraphs, show that if there ever was "another paper or waiver" transmitted from the Home, to the Arizona Office, such paper nowhere appears from the record; also that this alleged paper or waiver, was *never mentioned or in any wise presented* to Rogers and *no demand was ever made on him, nor was he ever requested* to sign any such paper or additional waiver - - not even in Mr. Caskey's letter of January 23rd, ante, (App. St. Sec. 8, Par. (h)); nor in any conversation detailed by Mr. Lindberg or any other representative of the Company.

Counsel's statement, therefore, that "there could be no constructive delivery of the policy" is beside the question; and irrelevant, because what is involved is an actual delivery which we submit the record abundantly shows. Rogers was guilty of no default or failure with respect to any demands or requests made on him with respect to his policy, and its delivery was actual and without any express or implied conditions.

Discussions of cases cited by counsel dealing with constructive delivery, would be useless since they are patently not in point. The law respecting the legal consequences of possession of an Insurance Policy is thus stated:

> "Possession by an insured of an Insurance Policy is prima facie evidence of its delivery and its verity as a valid and subsisting contract".

Aetna Life Ins. Co. v. Geher
50 Fed. 2nd, 659.
(Citing: *Berliner v. Ins Co.*
53 Pac., 922.)

(b) The policy was delivered through inadvertence and mistake.

We need not point out to the Court that:

(a) Mistake like fraud or any other issuable fact must be pleaded, and the pleading must point out clearly and with precision wherein there was a mistake; and

(b) That such mistake was mutual and did not arise from the negligence of the party relying upon the mistake for relief on account thereof.

Appellant seeks to be relieved of the consequence of Mr. Caskey's delivering the Insurance Policy to the deceased; and in this connection it is pertinent to point out that the burden was upon the Appellant to plead and prove facts that would relieve it from the consequence of its act - - *which act in this case it calls "mistake".* The mere denomination of an act as a "mistake" does not meet the pleading requirement of detail or certainty - - It is a mere conclusion, and could be the basis of no relief.

Nat'l. Mut. Fire Ins. Co. vs. Sprague
92 Pac., 227

Eucalyptus Growers vs. Orange County Nursery
163 Pac. 45

State vs. Minn. Land Impr. Co.
50 Pac. 420

Hughey vs. Smith
133 Pac. 68

In the instant case the Appellant neither pleaded nor proved any state of facts approximating what is known at law as a mistake - or any other state of facts that could be the basis of any relief.

On the trial of this case it is true, and in presenting this proposition for the consideration of the Court, there was and is a veiled intimation - - a sort of subtle suggestion, ostensibly based on some testimony of Mr. Caskey, that some unnamed and unsubpoened "typist" in some manner - - perhaps because of defective eye-sight, (might, mind you!) have sent Rogers' policy contrary to the instructions of Mr. Caskey, her superior. Nothing could be further from the facts.

We quote from the transcript (*Tr.* 120):

Mr. Ross: "When this policy (Rogers') was received from the New York Office, what was done with it?"

The Witness: "It was entered in this register, those large sheets, the details of it, the policy number and the premium and then the date it was forwarded to the agent in this particular case. The insured or applicant is also put in the register and then a record of it is made on a card, certain details of it, and then it is sent to the agent and with it is a, what you may call an invoice form giving him certain instructions on there as to what to do or what not to do, requirements and different things of that sort. That is all there is to handling policies in a branch office." (Tr. 79-80)

Q. What is your position:
A. Cashier.

Q. And were you the Cashier of the company on December 29th? A. Yes, sir.

Q. On December 29th, 1939? A. Yes, sir.

Q. And as such, did you have charge of the policies of the life insurance company, the defendant in this case?
A. Well, yes, I suppose what you mean, did I have charge of sending the policies out?

Q. Yes? A. I did.

Q. And you have examined this policy?
A. Today?

Q. Yes? A. Yes, sir.

Q. And this is the policy issued on the life of Zeno A. Rogers? A. Yes, sir.

Q. And did you mail this policy to Mr. Zeno A. Rogers?
A. Well, it was mailed under my supervision.

Q. It was mailed either by you or by somebody who was working under your supervision?
A. Yes, sir.

Q. Regular mail through the United States Post Office? A. Yes.

Q. Postage prepaid and addressed to him where?
A. Well, as I recall, Willcox.

Q. And is this policy in the same form and condition it was in when you mailed it?

A. As far as I know. I would not think there would be any change in it. It appears all to be there.

We think the conclusion - - in fact the only conclusion that can be drawn from the record, is that Mr. Caskey regularly mailed Mr. Rogers' policy to him at Willcox, Arizona, in the regular course of business without any restrictions, conditions, or requests; and that he intended to do just what he did - - - it was only later that he

began to have other "ideas" about the matter. (App. St. Sec. 8 Par 8)

Mr. Caskey seeks to leave the impression that *he first noted* that Mr. Rogers had possession of his insurance policy when he received Rogers' salesman report some time between the 15th and 23rd of January, 1940, and in this connection, we have a striking illustration of the old adage that "actions speak louder than words". Mr. Caskey states that it is the practice of his Company's Local Office about the 15th of each month to send to the various Company salesmen a certain routine blank on which the Local Office first, in appropriate spaces appearing thereon, enumerates the various policies which have previously been sent to the salesman; the amount of monies sent in by the salesman as shown by the Company records, and requires the salesman to *enter upon the report* the disposition of policies sent and other information requested.

Such a form paper and request, was forwarded by Mr. Caskey from the Local Office to Rogers about January 15, 1940, and thereon *was typewritten* the names of policies previously sent by the Home Office to Mr. Rogers with request for information concerning the same under the appropriate spaces entitled "remarks" (App. St. Sec. 8 Par. 9 ante). As sent forward by Mr. Caskey, *he noted thereon* that *Rogers' own* policy had previously been sent to Rogers and Rogers was asked for "remarks" concerning this policy, the same as any other.

Rogers, in the appropriate spaces, entered - not with the typewriter - but with pen and ink, the information called for by Mr. Caskey's communication; and among other things indicated by his remarks the status of his

own policy. When Caskey says that he first learned Rogers was holding his own (Rogers) policy when he received Rogers' report some time about January 15th, he is mistaken - - His own records and his own communications challenge his statement and establish the fact that he knew perfectly well that Rogers had this policy all the time.

At the time Rogers made this report, he had a number of promissory notes due him for commissions and premiums which would shortly be due, but not yet matured, and which he was holding. He did not, therefore, remit the amount of premiums hoped for by Mr. Caskey, and thereupon Mr. Caskey decided that he might improve the securities position of his Company and hasten collections, by the sending of his letter of January 23rd requesting Rogers to return his policy. He says "so that the Company might hold it until the premium was paid."

It is to be remembered that Caskey's letter of the 23rd (Tr. 129 - Defendant's Ex. E.) could not reach Rogers until about the date of his death, and that he would have no opportunity to suggest the existence of his credit arrangement with Mr. Lindberg, or to comply with any request to pay the initial premium.

The defendant Company was called upon to show that it should be relieved from the consequence of its act, i. e. the delivery of the policy. The record conclusively shows that Mr. Caskey actually intended to, and actually did mail the policy, that he did the very act which the circumstances required and dictated, and that it was his intention to do the very thing accomplished.

In view of the credit arrangement between Messrs. Lindberg, Rogers and Clem, and in view of the compliance

of Rogers with all requirements connected with the issuance of the policy, there was absolutely no reason why the policy should not have been delivered to Rogers.

In no place has the Appellant attempted to show that there was any *mutuality of mistake;* no place *was fraud pleaded* or shown; and no place was it shown that *the deceased in any manner whatsoever contributed to the mistake.*

Such a state of facts furnish no ground on which relief can be granted. 32 C. J. Sec. 44, p. 1271; *Traveler's Ins. Co. v. Jones,* 73 S. W. 978-979; *Wheeler v. Holloway,* 276 S. W. 653; *Magnolia Compress Co. v. Dennis,* 19 S. W. 2nd 339; *Grimes v. Sanders,* 32 L. Ed. 798.

It will be remembered that Caskey's letter was wholly a self-serving declaration and unrelated to the negotiations carried on by Lindberg; that the letter only reached Rogers about the date of his death; and that he had no opportunity to dispute or respond thereto. The law applicable to a situation of this kind is thus stated in 19 Am. Juris. p. 78, Sec. 58.

> **"Ability of Party to Avert Harm - Negligence -**
>
> In some circumstances, relief will not be granted upon a showing simply that the complainant, at the time of the disputed transaction, was ignorant of, or mistaken as to, some matter of fact; it must be made to appear that his ignorance was excusable. The conclusion is that he is not entitled to relief where the evidence shows that he was 'negligent' or that he could and would have ascertained the facts by the exercise of 'due' or 'reasonable' diligence, or where he had 'means of knowledge' or 'might have ascertained the truth'. In other words, mistake,

> to constitute equitable relief, must not be merely the result of inattention, personal negligence, or misconduct on the part of the party applying for relief. The issue as to whether the complainant did or did not exercise the requisite activity or diligence is to be determined, of course, with reference to the facts and circumstances which attended the transaction. Where the complainant's mistake or ignorance of facts has brought about a legal situation which must result in loss or prejudice to one of the parties to the transaction, relief will be denied if the evidence shows that they were equally well situated to be informed as to the facts."

We submit therefor that Appellant can claim no right to relief because of the action or lack of action of Caskey—the question is not what Caskey did, but what was the agreement between Lindberg and Rogers? No facts or circumstances constituting mistake which equity could relieve occurred in this case.

(c) The policy was sent to him in his representative capacity.

Appellant's suggestion in this regard constitutes *an obvious departure*, and the attempted introduction of a defense never mentioned heretofore. We observe under the preceding corollary ((b) ante) ,counsel argue and maintain, that it was not the intention of the Company to send Rogers his policy at all, or in any capacity; now counsel abandon the assertion of mistake and say in effect - "there was no mistake; we intended to send Rogers the policy but Mr. Rogers has a 'split peronality, a dual status', and we sent it to him in his capacity as agent."

In connection with the argument under this subdivision of Issue No. II, they quote from the case of *Urseth*

vs. Sun Life Assurance Company of Canada, (C. C. A. 8th, 1941, 119 Fed. (2d), 529. The lack of parallelism of the foregoing case, with the instant case is plainly apparent from a reading of the facts on which the decision was based. In that case when the policy was sent to the agent it was accompanied by a memorandum notifying him he "could not release the policy until the initial premium was paid".

Of course, in the instant case no such notice or memorandum accompanied Rogers' policy when received by *him,* or at any other time. The case we submit is in no wise in point.

Furthermore, counsel's statement that "the policy in the instant case was forwarded to Rogers along with other policies which was sent to him as Appellant's agent" is not correct. There is not one scintilla of evidence in the record to that effect.

There is a suggestion that policies are sent from the local office to the agent, and that more than one might be sent at one time, but by the ruling of the Trial Court in this case, Mr. Caskey, who was testifying about this matter, was limited in his testimony to what was done respecting the delivery of Rogers' policy - not as a general practice and not what was done in other cases. Nowhere does it appear that any other policy was at the time sent to Mr. Rogers with his own.

We think this proposition is patently without merit.

Even had there occurred any circumstances which might be the foundation for a Plea of Mistake, the Defendant herein does not come into Court with Clean Hands, and under the familiar Maxim

it would be entitled to no equitable relief with respect to the insurance policy.

We submit that the circumstances attending the delivery of the Insurance Policy in this case, could in no wise furnish the basis for the defense of alleged mistake, but even were there such basis, the defendant "does not come into Court with clean hands" and is not qualified to set up such an equitable defense.

The record herein, shows, that upon the death of Rogers, and while his widow, the plaintiff, was making preparations for bringing her husband's body to Phoenix for burial; and after Mr. Lindberg had asked permission to enter Rogers' hotel room at Willcox, and the widow had requested him not to do so, and had emphatically forbidden him to do so, Mr. Lindberg, the defendant company's Agency Director and Chief Representative, in complete disregard of fair dealing, equity and common decency, forcibly entered the private room of Rogers, and took therefrom the personal effects and property of the deceased, (App. St. of Facts, Sec. 10, Pars. (a) & (b)).

It is apparent, that when Messrs. Lindberg and Caskey learned of Rogers' death, their frantic purpose was to defeat a collection under the policy, by any means. Rogers was dead - his lips were sealed - To their minds, the only threat to their design and purpose, were the records and papers which were located in Rogers' Willcox hotel room; and their first thought was to grab these - by guile if possible, by force and stealth, if necessary.

Rogers' effects, including his personal papers and the Insurance Policy involved, belonged to his personal rep-

resentatives and beneficiaries - subject to administration by the courts of the State of Arizona.

The Arizona courts were open to the defendant; and if the company had any rights with respect to the property contained in Rogers' room, it could have gone into the courts in the regular and prescribed manner, and there asserted its rights and obtained its proper remedies. The company did not do this. It took the law into its own hands and sought to improve its position with respect to responsibility under the policy, by its own wrong doing, and by this wrongful conduct, it forfeited any equitable right it could by any possibility have, with respect to possession of the stolen policy.

It is unnecessary to cite authorities with respect to this ancient maxim of equity. The examples of the application of the rule are legion, and unconscionable conduct such as that of the company's representatives in this case invokes the severest criticism of the courts. (21 C. J. Par. 165,) and cases cited hereunder.

ISSUE III

In the interest of brevity, and with apologies to counsel, we will undertake to outline what we consider the decisive factual and legal features arising under this issue, viz:

The import of Appellant's argument, hereunder, is to the effect: "That Rogers, previous to his death, did not pay in cash, his initial policy premium of $40.50, and therefore, his policy never became effective."

In connection with their argument, they make certain assertions with respect to the law and the facts of the case, which may well be eliminated, because they are eith-

er obvious, or have no bearing on the ultimate question -- For instance counsel say in substance:

(a) An agent's act beyond the scope of his authority, does not bind his principal.

(b) One having knowledge of the limitations of an agent's authority, is bound by such limitations.

We may well concede these obvious legal propositions and the authorities cited in support. These, it will be shown presently, are not important to a consideration of this issue.

With respect to the facts, counsel, in substance, say:

(a) That the pamphlet entitled "Instructions to Agents" and the application for the policy, state on their face, that the insurance involved, does not become effective until the first premium has been paid, or is received by the Company, or is in the hands of the agent.

To avoid prolixity, we will admit the contents of these statements in substance, but not their alleged legal effect.

This Issue, it seems to us, is resolved by the following appertaining points or authorities which logically arrange themselves in a related sequence.

1. The statements of the Company's Agents' Pamphlet, Policy and Applications, are to be construed in the light of its customs and practices, with respect to their subject matter - The actual practice followed.

Equity looks to the substance of things, rather than to their form; and it disregards matters of form and technical nicety. It is interested in the substance of things

and not their shadow, and deals with human affairs upon that principle - penetrating beyond the cover in examining the essence of things,

Hitchman Coal & Coke Co. v. Mitchell
245 U. S. 29; 38 Sup. Ct. Rep. 65;
62 L. Ed. 260

Jones v. New York Guarantee & I. Co.
101 U. S. 622; 25 L. Ed. 1030.

Gay vs. Parpart,
106 U. S. 679; 1 Sup. Ct. Rep. 456,
27 L. Ed. 256

as was stated by the California Supreme Court in *Vance v. Anderson,* 113 Calif., 532, 45 Pac. 816:

> "Equity looks beyond the mere form in which the transaction is clothed, and shapes its relief in such way as to carry out the true intent of the parties to the agreement, and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, their relations to one another and to the subject matter, are subjects for consideration".

Now when one of the parties to the transaction involved, has passed away, and important transactions have eventuated, the Appellant Company may not to the prejudice of others, point to these technical statements and in effect say:

> "It makes no difference what we have done or said, or how our conduct may have influenced others - Here is what our papers say. We elect to be judged only according to their technicality".

That is the ultimate import of counsel's argument.

The question is not - just what does the Company's papers say - but how does it do business?

> **2. There is nothing inconsistent between the statements in the policy, application and agents' booklet of instructions concerning authority of agents' in conflict with our theory of this case. These so-called restrictive statements must be measured by the construction placed thereon by the parties in actual business operations. In most circumstances they apply only to local soliciting field agents, and not to the general manager or Agency Director of the local or Arizona Branch Office.**

We shall presently point out to the Court the facts and law arising therefrom—including the functioning of the business plan under which the Company operated, and show how these completely sustain the plaintiff and Appellee; but since counsel have sought to place a purely technical and extremely restrictive and impractical construction, on these various terms and statements, we will undertake to point out generally, how these are regarded by the courts in dealing with insurance matters.

The book of instructions to agents which is referred to by appellant is not shown to be a book purporting to indicate or show limits to, or circumscribe the authority of general agents or company managers or Agency Directors. Mr. Lindberg was and is the Agency Director or Manager of the Branch Office of the New York Life Ins. Company for the entire State of Arizona. As such Director, he is not to be ranked in the catagory of special or *soliciting agents.* Mr. Lindberg is the alter ego, the plenipotentiary, the factotum of the Company for the State of Arizona.

While the book of instructions declares that policies may not be delivered except for pre-payment in cash, the record shows that it is the accepted practice of the company to oftentimes deliver policies without actual pre-payment of cash, viz. by the acceptance of Notes payable to the agents, either as full payment or down payment on the initial premium, and the policy then being delivered without pre-payment in cash to the insured.

The policy application to which reference is made by appellant in indicating limitations on agents, refers to *soliciting* agents, and in no manner does it refer to the authority of the plenipotentiary or general manager of the defendant.

Limitations upon Mr. Lindberg's authority are not necessarily deemed to be conclusive upon the insured, and may be considered to have been impliedly waived by the agent's ostensible or apparent authority.

Hence the record itself established both the delivery of the policy without pre-payment in cash, and extension of credit, all of which is shown as the usual course and practice of appellant in its business notwithstanding the written instructions to agents in the aforesaid booklet and policy applications.

That the word "agent", in an application and policy, does not comprehend "General Agents", See: *Hartford Life Ins. Co. vs. Hayden's Admr's.*, 90 Ken. 39, 13 S. W. 585, where the Court declared:

> "The term 'Agent' in an application and policy of insurance providing that agents are not authorized to vary the terms of the policy, or to receive dues, does not apply to general agents".

So also to the same effect are: *New Eng. Mut. Life Ins. Co. vs. Springgate*, 113 S. W. 824; *Kentucky Home Life Ins. Co. vs. Johnson*, 93 S. W. 863.

We assert then, that the record, supports our contention that Mr. Lindberg as the plenipotentiary of the company, acting as its chief representative, within the State of Arizona, did have apparent or actual authority to effect the credit arrangement, providing for the payment of premiums out of Rogers' commissions. (App. St. Secs. 4; 6, Pars. (a)-(d) Tr. 92, 98; 171-182; 185, 186).

In this connection, re, credit, appellants assert that the only testimony in the record relative to premium payment was appellee's statement that Mr. Lindberg told her of the credit arrangement. This is not correct. Her testimony is corroborated by Gale A. Rogers, her son, who was a witness to remarks made by Mr. Lindberg to Mrs. Rogers, (Tr. 189-190) and such matter of credit arrangement was further substantiated by the testimony of Mr. Clem, (Tr. 181-182), as well as by legitimate inferences to be drawn from the entire transaction.

Mr. Rogers had no notice of any limitations or restrictions upon Mr. Lindberg's authority as the manager or *Agency Director*. The book of instructions referred to, applied to *soliciting* Agents. It is assumed such books of instructions were given to soliciting or local agents. There is nothing about the book or anything in the record to show that the instructions in such document related to or pertained to the duties and authority of Mr. Lindberg. Consequently even granting that Rogers had such book of instructions, nothing therein would give Mr. Rogers any notice of any limitation on Mr. Lindberg's authority as Director of the Company's Arizona business.

The application, fairly construed, related to limitations on the authority of *soliciting* agents. Therefore, it cannot be argued that Rogers, as the assured, had any notice or knowledge of limits to Mr. Lindberg's authority. Lindberg, to him, was the general manager of the defendant's business in Arizona. He was not to Rogers, the soliciting agent. (*Capital Livestock Ins. Co. vs. Campion*, 204 Pac. 604).

Because the factual situations are strikingly similar to that of the instant case, we particularly invite the attention of the Court to *Union Life Ins. Co. vs. Haman*, 74 N. W. 1090; and *Snyder vs. Nederland Life Ins. Co.*, 202 Pa. 161, 51 A. 744.

In *Union Life Insurance Company vs. Haman*, the insured, Drewlow, by name, had acted as assistant to a soliciting agent of the defendant company. Drewlow had in his possession an insurance policy which, among other things, he used as a "decoy policy" as an agent. The company denied liability, on the ground that Drewlow made no application in good faith; never intended to take the insurance and paid no premium thereon.

There was evidence to show that the matter of Drewlow having the policy was discussed by Drewlow and the general manager, in the presence of a Mr. Chapman, another agent and friend of Drewlow. During the discussion, the general manager said to Drewlow, that "he could take the policy and pay for it out of premiums he would make from the business". At this point Chapman was called out of the office. The general manager and Drewlow were left alone. Later Chapman returned to the manager's office and in the absence of Drewlow, the manager told Chapman: - - - "Drewlow had concluded to take the policy." Under this state of facts the

Court found that the general manager could waive a pre-payment of the initial premium, for he had acted with apparent power within the scope of his authority.

In *Snyder vs. Nederland Life Ins. Co.* (*supra*) the action was on a policy on which the premium admittedly had not been paid. The insured was a local agent of the company. The policy was delivered to him under an agreement that the commissions he should earn should be applied by the company to the premium payment. The insured died a few weeks later, but before he had earned any commissions. The agreement as to the delivery of the policy and the manner in which the premium was to be paid was made with the knowledge and consent of the general agent. The Court declared that: "The company could waive the stipulation made solely for its protection, * * * and its general agent could bind it in this regard; * *.

3. Notwithstanding any Application, Policy or Agents' Pamphlets, and notwithstanding any statements to the contrary, the Appellant has an established, and does a substantial part of its insurance business under a credit system; and makes and delivers its policies on a credit basis.

From an examination of the record and the scope of the Company's business, it is a fair estimate to say that a preponderance of the Company's business is done on such credit basis.

To profess that because of any statements contained in its Applications, Policies or Agents' Instructions, the Company does not do business on a credit basis, is a glaring instance of intellectual dishonesty. The Company's method is subtle and elusive it is true. Nevertheless, it is on a credit basis that it does a substantial,

if not the major portion of its insurance business, (App. St. of Facts, Sec. 2, Par., (b) & (c)).

The explanation of the system by its local representative, Mr. Caskey, is disingenuous, but nevertheless, effectively establishes the actual operation of such a credit system. Here is his testimony: (Tr. 142-144, 156).

> **"Mr. Dougherty: Now, Mr. Caskey, do you say that in all cases where policies of this nature, similar policies are issued on the lives of the insured, that the premium, the first premium must be paid in advance before the policy is delivered?**
> **The Witness: You mean on the life of an agent?**
>
> **Q. No, I am speaking of -**
> **A. No.**
>
> **Q. Do you deliver policies on credit?**
> **A. No, sir.**
>
> **Q. Well, how do you get around it? You don't get cash always, do you?**
> **A. No, the agent is responsible to us.**
>
> **Q. Well, your company does?**
> **A. No, we deliver to the agent.**
>
> **Q. Yes, without the pre-payment of the premium?**
> **A. That is right.**
>
> **Q. And who do you look to for payment?**
> **A. The Agent.**
>
> **Q. So that you deliver that policy then on the credit of the agent?**
> **A. No, we deliver to the agent.**
>
> **Q. And who do you look to for payment?**
> **A. The Agent.**
>
> **Q. The agent? A. Yes.**

Q. Now, that is extending credit to the agent, isn't it? A. No.

Q. No?
A. No, it is not. We hold his credits for those premiums.

Q. Yes, so you look to him for payment?
A. That is right.

Q. And there was nothing about the delivery of this policy that distinguished it from the delivery of any other policy to any other agent?
A. Well, what do you mean by that? Put it a little more clearly there.

Q. Yes. You didn't get - what you are telling this jury is, you didn't get cash before this policy was delivered?
A. That is right.

Q. Now, in your ordinary practice of your business, business practice rather—
A. Yes.

Q. Do you deliver policies without having received a pre-payment of the premium?
A. Well, I don't - -

Q. Your company does?
A. No, the agent may.

Q. How the policy finally reaches the insured I am not concerned about, but the result of the methods you employ is, that a policy is delivered to the insured in many cases without the pre-payment in cash of the premium, isn't that true?
A. Oh, yes, the agent delivers them to the applicant without pre-payment of cash.

Q. When an agent delivers the policy to an applicant and receives cash, does he give the applicant any form of receipt for the policy?
A. Well, he is not required to because the policy it-

self is a receipt for the payment for the first premium. There is no necessity for giving the receipt.

Q. The policy itself is a receipt for payment of the first premium. A. It states it is."

Now, if this witness' testimony means anything it es tablishes as facts that:

1. The company issues and delivers its policies on a credit basis.

2. The company does deliver policies without the payment of the initial premium in cash.

3. The delivery of the policy is regarded as a receipt for the payment of the initial premium.

4. On delivery, the effective date is by relation, established as the date fixed in the policy.

The Appellant's credit system was the subject of discussion in the case of *New York Life Insurance Company vs. Silverstein*, 53 Fed. (2d), 986, and our conclusions as above stated are there sustained.

The Seeming Contradiction

Rogers' application and policy are made part of one instrument and are to be construed together. The provisions of the application and policy which are of materiality in this case are in substance as follows:

The Application (Plt's. Ex. No. 3, Tr. 92-95)

(1) Only enumerated officers can make, modify or discharge the policy or waive any company requirements.

(2) Acceptance of a policy by the assured is an acceptation of all waivers and conditions.

(3) The insurance goes into effect as of the date of execution when:

(a) The policy is delivered to and accepted by the applicant.

(b) The first premium is paid thereon.

The Policy (Plt's. Ex. No. 3, Tr. 86-89)

(1) The policy and application constitute the entire contract.

(2) No agent has authority to modify the contract or extend the time for payment of premium.

(3) The policy is dated December 19, 1940.

(4) The date of execution is the anniversary date of the policy from which dues are computed if the policy is accepted.

(5) The policy is made in consideration of the application and the pre-payment of the initial premium of $40.50.

(6) The first premium of $40.50 must be paid in advance and maintains the policy for a period of six months.

(7) The policy constitutes, and in the hands of assured is a receipt for the payment of the first premium.

The construction which counsel for Appellant seek to place upon the transactions between the Insurance Company and Rogers, is that the company's business plan under which its policies become operative should be disregarded; and that the applications and the policies should be interpreted and construed entirely by the technical provisions thereof.

We differ with them, because we say that the surround-

ing circumstances should be looked to; that the construction placed thereon by the parties, must be considered; and that for this reason, the operating plan should be regarded as of importance in construing the contract; that there is no contradiction and no inconsistency between the interpolation of the credit plan for which we here contend —and which the company follows, and the written provisions of the policy; and that under our construction, both the written provisions and the business plan followed by the company, are entirely consistent and both are given effect. 6 Ruling Case Law, Sec. 239, page 849; Sec. 241, page 852; *Miller v. Brooklyn Life Ins. Co.*, 12 Wall., 285, 20 L. Ed., 398; *Buckley v. Citizens Ins. Co.*, 188 N. Y. 399, 81 N. E. 165, 13 L. R. A., (N. S.), 889; *Lawrence v. Penn. Mut. L. Ins. Co.*, 36 So., 398; *McAllister v. New England Mut. L. Ins. Co.*, 101 Mass., 558, 3 Am. Rep., 494.

Appellants counsel say in substance, "there is no credit plan. The policy does not take effect until the assured pays the first premium in cash during his lifetime". We say - and Mr. Caskey for the compainy sustains us, that there is a credit plan under which policies are delivered to the assured; that such policies when accepted by the assured, immediately go into effect as of the date of issuance; and that the provision regarding pre-payment of the initial premium, *is constructively met* by the delivery and acceptance of the policy—which in itself and by its own language, is an acknowledgment of the receipt by the company, of payment of the initial premium; and the company thereupon, looks to its agent for the *actual payment* of such initial premium.

The transaction whereby the insured agrees to pay the soliciting agent the premium on the policy delivered to

him, and the transaction whereby the agent agrees that the Company may pay itself out of any funds standing to his credit on the Company's books, may be regarded as separate and independent contracts which do no violence to, and do not come within any restriction found in any provision of the Company's application, policy or agents' instructions. It follows, therefore, that the Company's operating plan as we have shown it to exist, and the provisions of its documents are not inconsistent and both may be effective without violence to either. The Company admits the plan which we have outlined (See Mr. Caskey's testimony), and we find difficulty in reconciling counsel's restrictive argument with the admission of their client.

4. The credit system applies to direct transactions between the company and Rogers as well as where third parties are involved—in both cases credit is extended to the soliciting agent to whom the Company looks for payment.

Mr. Caskey exhibited a remarkable dexterity in avoidance of questions of the slightest legal color which might be embarrassing to his employer, but had no hesitation in giving a legal opinion, however involved, where it might be helpful to his Company. He also showed commendable industry and ingenuity in attempting to support his oral testimony, by the production of some "paper" where his purpose might be served. His legal acumen was put to a severe test when he attempted to distinguish "debt" from "debt" - - To show that when policies for third parties were delivered to the soliciting salesman, the latter became indebted to the Company and the consequences was a "debt", but if the Company delivered a personal policy to the salesman on credit, the "debt" was not a "debt". He was unable to find any convenient

"paper" to sustain his position, and finally arrived at a distinction without a difference.

Defendant's Exhibit "F",—"Instructions to Agents'" provides in part (Tr. 134, 137), that the Company will not accept a note for the first premium; that if an agent takes a note he does so at his own risk, and is personally responsible for the same.

With respect to these notes, Mr. Caskey further testified as follows, (Tr. 159, 161):

"Q. Now, Mr. Caskey, your agents usually are used to collect notes received in payment for the premiums, are they not?

A. Well, we don't use them to collect notes, because we have nothing to do with the notes. The notes are theirs and payable to them. They can't be paid to the New York Life.

Q. They cannot?

A. We do not accept any notes.

Q. You look to the agent?

A. The agent looks to himself. We don't look to the agents at all.

Q. Now, on those premiums you say have been collected. Were any of the premiums represented by notes?

A. I imagine so. Some of those were collected?

Q. Yes? A. Oh, yes, I imagine so.

Q. Then you do collect notes for premiums?

A. Yes, sir: because the man was dead.

Q. As a matter of fact, agents frequently turn in notes and you collect it, don't you? (160).

A. Oh, no.

Q. You never collected it?
A. No, sir; just the opposite. We have nothing to do with it."

* * * * * *

"Q. In other words, after Mr. Rogers passed away it was purely a matter, a voluntary matter with the policyholders whether they paid it or not?
A. That is right.

Q. You made no effort to make any collections?
A. Yes, we just told you we did.

Q. On these notes? A. Yes.
A. On the notes? A. Yes."

* * * * * *

"Q. So had Mr. Rogers lived, he would have - - it would have been his privilege and duty to have collected them?
A. And his duty to collect them, yes, sir. We had nothing to do with them."

* * * * * *

It will be observed from the testimony of this witness and the remaining record in this case, that promissory notes from the insured to the agents were entirely a matter of arrangement between the soliciting agent and the insured; that such notes are the personal property of the soliciting agent, and the collection of these notes is entirely a matter of his concern.

The obvious reason for the working out of this plan is that, were the Company to accept these notes in payment of first premium, the soliciting agent would be entitled at that time to payment of commission on the policy sale - To avoid this, the Company charges the soliciting agent's account with the first premium due on the policy when the policy is delivered to the agent, the premium matter is considered closed and it credits him to the extent of any re-

mission when he sends in money from note collections or other sources.

While the Company's pamphlet entitled "Notice to Agents" provides that the Company will accept cash only in payment of his first premium, this provision is met by the plan whereby the agent is responsible for this first premium, and the Company indulges the constructive acknowledgment, that he has, or will have, in his account with the Company sufficient cash credit to pay this premium—His liability is a new and independent debt.

In the first place the soliciting agent is used in the chain of delivery - he receives the policy from the Company and delivers it to the insured.. After the policy has passed out of his hands and into the hands of the insured, the latter has an effective policy; and the Company looks to the agent for payment of the premium at some unfixed future time - it being presumed that the agent will ultimately have in his account with the Company sufficient money to pay this premium.

Where credit is extended to the agent for his personal policy, the Company similarly looks to the agent for payment of the premium. In both transactions the policies pass out of the hands of the Company and into the hands of the insured. In both, the Company looks to the agent for payment of the first premium; and in both, the policies go into effect on delivery.

The time at which the Company actually receives its initial premium may depend upon the diligence and industry of the agent, but time is not the essence of the contract of payment, since it is fixed for convenience only on the happening of a future event, and where the fu-

ture event does not happen, a reasonable time is implied.

New York Life Ins. Co. v. Silverstein, supra

Crooker v. Holmes,
65 Me., 195, 20 Am. Rep. 687

Nunez v. Dautel
19 Wall., 560
22 L. Ed. 161.

5. There was an agreement between the Company, acting by Mr. Lindberg, Agency Director, that Z. A. Rogers should, or might, pay the initial premium upon the policy for which he applied, out of his future earnings.

We respectfully invite the Court's attention to Appellee's Statement of the Case, (Sec. 4, Par. (b); Sec. 6, Pars. (a) & (b); Sec. 11, Pars. (a) to (c) inc.)

These abstracts, amply supported by the transcript, show definitely from the evidence of Mr. Clem, Mrs. Rogers, Gale Rogers, Mr. Lindberg and Mr. Caskey's letter of December 23, 1940, that a credit arrangement for the payment of the initial premium on Z. A. Rogers' policy had been definitely made and was in full force and effect at the time of his death. We mention this only because, in their argument, counsel suggest (p. 30), a conflict of proof on this point.

It is unnecessary to re-examine this question of fact, because the jury's verdict resolved this fact, as all others, against Appellant and in favor of Appellee. It is true that on the trial this statement is argumentatively challenged by the Appellant, but nevertheless, there is a preponderance of the evidence in the record supporting Appellee's contention, and as we conceive the rule to be upon appeal

from the verdict and judgment, no inquiry will be made respecting the preponderance of the evidence.

"The Trial Court's findings on questions of fact on conflicting evidence, are binding on the Appellate Court".

Aetna Life Insurance Company v. Geher
50 Fed. (2d) 657.

"If there be any evidence in support of the verdict the action of the Court will and must be affirmed." *Hayne New Trial on Appeal*, Rev'ed Issue, Vol. 2, Sec. 288, Page 1622; *Heinlen vs. Heilbron*, 97 Calif., 101, 31 Pac., 838. In further extenuation of our observations, with reference to this proposition, we advert to the matter only because there is a tendency exhibited throughout the Brief to again argue the facts of the case, which we consider settled by the jury's verdict.

6. Mr. Lindberg had actual or apparent authority to enter into the agreement with Rogers and Clem.

We have shown (supra this Issue) the identity of credit arrangements with respect to Rogers' personal credit arrangements and transactions involving third parties. We there show that while in one instance a third party, and a note or other evidence of indebtedness to the agent might be involved, these minutia did not change the proposition that credit in effect, is extended to an agent, and the presumption is indulged that he will make payment out of his commission account, or from other funds.

In view of counsel's argument that there is no such thing as a credit plan in the Company's method of operation because of restrictive provisions in the Company's documents, there is an implied argument that the cred-

it arrangement between Lindberg, Rogers and Clem could not be made. We think we have amply shown that credit arrangements could legally be, and actually were made. Furthermore, these so-called restrictions in no wise precluded the Rogers' credit arrangement, as the authorities show, and do not as we will point out hereunder, sustain the narrow construction for which counsel contend.

The United States Supreme Court has determined that acts of the agent beyond restrictions or limitations of his power shown in the policy may be warranted by a course of conduct or business. In *Knickerbocker Life Ins. Co. vs. Norton*, 96 U. S. 234, 24 L. ed. 689, the Court said:

> "A declaration in a policy that the Insurer's Agents had no power to make agreements or waive forfeiture, is only a notice to the assured, which the insured could waive and disregard at pleasure. * * * whether such Company had or had not authorized its agents to make extensions and whether an extension was made in a case; are questions for the jury."

To the same effect as the above decisions are: (*Schwartz vs. Northern Life Insurance Company*, 25 Fed. (2d) 555; Certiorari denied, 73 L. ed. 547; *Ollich vs. New York Life Insurance Co.*, 42 Fed. (2d) 399; *McConnell vs. Southern States Life Ins. Co.*, 31 Fed. (2d) 715; *Metropolitan Life Ins. Co. vs. Williamson*, 174 Fed. 116.

And *Vance On Insurance*, p. 178, is authority for the further proposition, that:

> "An absolute delivery of a policy by such agent without payment of the premium, under such circumstances as will justify an inference that

> credit is given will constitute a waiver of the condition of a pre-payment".

The proposition that a general agent, may extend the time for premium payments, and certainly Mr. Lindberg's authority was at least that of a general agent, is conceded by authorities, as indicated by *Couch On Ins.*, Vol. 3, Sec. 633, pp. 2028-2029;

> "So, a general agent may extend the time for payment of premiums, * * * and the time for payment may be extended, (by) a superintendent of the insurer, * * * again, an extension of time may arise as the result of a custom or course of dealing on the part of the company or its authorized agent; likewise by the agent's acts and declarations by which insured is induced to believe that time is, or will be, extended as in former instances, etc. * * * *".

That general agents of the insurer may effect waivers is also supported in somewhat similar language by Sec. 821, Vol. 29, *Am. Jur.*

Couch, Vol. 2, Sec. 514, supports the proposition, that the insured has the right to deal with the agent upon the faith of apparent authority, where the agent's limitations are unknown to the insured.

> "One dealing with an Insurance Agent, and having no notice of any limitation on his powers, has the right to deal with him upon the faith of his ostensible powers, whether his agency is general or special. So, a person may bind an insurance company by his acts as general agent, where he is held out as such by the company in the community where he does business, provided limitations on his powers are unknown to those dealing with such agent".

So also to the same general effect are: *Capital Livestock Ins. Co. vs. Campion*, 204 Pac. 604; *Van Werden vs. Eq. Life Assurance Soc.*, 68 N. W. 892. In the latter case the Court observed:

> "Where a foreign Life Insurance Society maintains a branch office in a State, with a Manager whose agency is general in that State and to whom the people look for information or adjustments of the Society's business in the State, the acts and knowledge of the Manager are the acts and knowledge of the Society".

An agent with general power, or clothed with actual or apparent authority may waive restrictions, or by his acts and conduct, waive written conditions of the policy, notwithstanding such restrictions. This concept is based upon the theory that such restrictions are ineffectual to limit the legal capacity of the company to bind itself by waiving conditions of the policy through an agent, acting within the real or apparent scope of his authority, and whose knowledge in such case is imputed to the principal.

Provisions in insurance policies restricting the authority of agents are not literally enforced by the Courts regardless of circumstances; *Public Savings Ins. Co. vs. Manning*, 111 N. E. 945; citing *Richardson vs. Brotherhood, L. F. E. Soc.*, 126 Pac. 82, 41 L. R. A. (N. S.) 320.

Likewise it has been declared that provisions limiting the power of agents to waive policy terms except in writing; do not apply where waiver may be implied from the conduct of the agent, *Mishiloff vs. Amer. Cent. Ins. Co.*, 128 Atl. 33.

Rosebraugh vs. Tigard, 252 Pac. 75, is further author-

ity for the proposition that waiver may be implied from the circumstances surrounding or incident to the transaction.

The Court, in the above case, with respect to the proposition under discussion observed at p. 78.

> "An insurer is precluded from asserting a forfeiture for delinquency in payment of a premium, * * * where by its course of dealing or business or its custom or by any course of conduct, known to insured, it has induced an honest belief on his part that prompt payment of the assessment will not be insisted upon, or that payment need not be made until demanded". 26 C. J. 329; 14 R. C. L. 1183, 1184; *Cranston vs. Westcoast Life Ins. Co.*, 72 Or. 116, 142 Pac. 762; *Hinkson vs. Kansas City Life Ins. Co.*, 93 Or. 473, 183 Pac. 24; *North Amer. Acc. Ins. Co. vs. Whitesides*, 134 Ill. App. 290.

That Mr. Lindberg's power to effect the waiver provisions here contended for may not only be inferred from the attendant circumstances, but that such power might be implied from the designation of his title is sustained by *Whipple vs. Prudential Life Ins. Co.*, 222 N. Y. 39, 118 N. E. 211, where the Court observed:

> "The designation of 'manager' implies general powers. It could not be held as a matter of law, that he did not possess as General Agent, general powers. That he had control of the business of the Cleveland office permits the reasonable inferences that his acts were presumptively those of the company".

And, by the case of *Hartwig vs. Aetna Life Ins. Co.*, 158 N. W. 280, where the Court said: "Credit may be

given for the first premium, and, if not expressly given it may be shown to have been given by circumstances characterizing the transaction".

In view of the citation of authorities, can it be gainsaid that Mr. Rogers was not induced to believe that Mr. Lindberg had apparent authority to effect the credit arrangement, when Mr. Lindberg was already party to the credit arrangement in re, Mr. Clem's $75.00 expense loan?

It may be noted in passing that the cases cited by Appellant's counsel under this Issue generally have to do with fact situations where the agent involved was a *soliciting* agent. That powers of the soliciting or subagents are more closely scrutinized by the Courts, requires no citation of authorities. This distinction, with regard to the fact situations may be observed with reference to all of Appellant's cases cited under this Issue with the exception of *Penn. Mut. Life Ins. Co. vs. Blount*, 33 Ga. App., 642, 127 S. E., 892, and their quotation from such case does not show the facts on which the Court's decision rested. An examination of the facts will show that it is in no wise a parallel case. In our previous argument under this Issue we have attempted to point out in detail the relationship between the contents of the Appellant's policy and application, and its operating plan (See No. 3 ante).

The Penn. Mutual Life Insurance Company's operating plan, with which the Georgia case dealt, differed from the instant case. In that case the concept of a constructive satisfaction of the requirement for payment of the initial premium was precluded. Under that plan - although

the policy recited that delivery was considered a receipt for, and an acknowledgment of the payment of the initial premium, the Court found under the Company's operating plan that in no event could there be a legal delivery of a policy until the initial premium was actually paid in cash; and if a policy were delivered without such actual payment by the assured, in cash, such delivery would be considered of no force and effect. Such is not the operating plan of the Appellant Company, and for that reason the Georgia decision is not in point.

7. Rogers' policy became effective on delivery, and receipt thereof, and was effective at the time of his death.

The policy in the instant case was applied for on December 7th, 1939, and a rider with reference to aeronautical activities which constituted part of the application was executed by Rogers on December 11th, and thereafter on December 19th, the company at New York issued the policy embracing all the essential elements as set out in the application. Thereafter in due course of mailing, and a few days after December 29, 1939, delivery of the policy was effected without any memoranda or instructions to Rogers. (App. St. Secs. (6), (7) & (8) ante).

In view of the fact that a credit arrangement providing for the extension of time in which to pay the premium had been made between the Agency Director, Rogers and Clem (App. St. Sec. 6, ante), the policy became effective December 19th, 1939, the date of its execution. While there was conflict in the evidence as to the making of such credit arrangement and extension of time for payment, the conflict was resolved in favor of the appellee by the jury.

The policy having been issued and embodying all the essentials as set out in the application, its unconditional delivery without memoranda or instructions to Rogers made it effective on December 19th, 1939, its execution date, though delivered to Rogers about January 1st or 2nd, 1940.

Farnum vs. Phx. Ins. Co.
83 Calif. 246

Aetna Life Ins. Co. vs. Geher
50 Fed. (2d) 659

Berliner vs. Travelers' Ins. Co.
53 Pac. 922

Bloom vs. Pac. Mut. Life Ins. Co.
259 Pac. 496

Appleman On Ins.
Vol. 1, Sec. 131, p. 121

The credit arrangement having been made and the policy having been delivered in pursuance thereof, the policy was binding and effective on the company, as of the date of delivery, and if binding and effective as of that time, in view of the credit arrangements, as the jury found, then it follows that the policy was in full force and effect at the time of Rogers' death.

8. Rogers had the privilege of paying the first premium on his policy out of his earnings or out of any other funds he might care to use.

Where, as in this case, credit was extended for the initial premium, with the understanding that it would be paid out of future commissions of Rogers, the payment was not conditional to the extent of depending wholly and finally on that method - such a stipulation is regarded as securing the debtor a reasonable amount of

time within which to procure in one mode or another, the means necessary to meet his obligation,

Nunez v. Dautel,
19 Wall., 560,
22 L. Ed. 161

9. On the death of Z. A. Rogers, his wife and son, and his wife individually, succeeded to the right of the deceased to make payment of the premium within a reasonable time.

Under Par. 978, Chap. 20, RCA, (1928), (Descent and Distribution), Rogers' wife and son succeeded to any interest which the deceased father might have. In addition the wife, named therein as beneficiary, had a further right to make payment as the beneficiary under the policy.

Sargent v. Adams
Mass. 3, Gray, 72, 63 Am. Dec., 718.

The effect of Z. A. Rogers' promise to pay the initial premium was an agreement on his part to pay the same out of his earnings, and this implied that he would have a reasonable time so to do, and would also have the right to make payment from any other funds he might be able to supply, (See our argument under (8) this Issue, supra). His personal representatives would succeed to his rights, and would have a reasonable time in which to make payment in the event Rogers' commissions did not satisfy his debt.

10. Rogers' payment of his initial premium could not become due until demand for payment was made.

"If a contract for payment of money fixes no specific time of payment, it is payable on demand."

Columbia Bank v. Hagner
1 Pet. 455, 7 L. Ed. 219

Grant v. Groshon, c Amer. Dec. 725.
Note, 12 Am. Dec. 575.

By the terms of Rogers' policy, the initial premium amounted to $40.50, and prepaid the premium for a period of six months - up to and including June 19, 1940, when there would have become due a like sum of $40.50 as an accruing premium.

At the time of his death, Rogers owed the Company a debt of $40.50, which might be discharged by payment by means of future commissions within a "reasonable time", or by payment from any of his other funds which he might care to apply on this debt.

In view of the fact that the debt was not payable at a fixed time, it was essential that a demand be made for payment, and in such event he would have a reasonable time to comply with such demand.

21 Ruling Case Law, Sec. 8, Page 15.

11. The Appellant Company gained no rights by Lindberg's wrongful act in entering the room of the deceased, and taking Rogers' policy, notes and effects.

We have heretofore had occasion to refer to Lindberg's conduct with respect to his wrongful entry in discussing Issue 2, (ante) relative to Appellant's request for equitable relief on the ground of mistake. We, are, therefore, suggesting the applicability of the maxim:

"He who comes into Equity must come with clean hands".

It is also an age-old maxim of the law that:

> "One party to litigation may not improve his position by his wrongful conduct".

Another cognate maxim is that:

> "He that hath commiteth inequity, shall not have an equity".

Stated in another way, the Courts have said:

> "A Court of equity cannot be successfully invoked to assist parties in taking advantage of their own deliberate wrong and willful misconduct", (10 RCL, Sec. 139, Page 389). *DeWolf vs. Johnson;* 10 Wheat., 367, 6 L. Ed., 343.

As suggested previously, when Rogers died, Messrs. Lindberg and Caskey became concerned about his insurance matter. They knew perfectly well, or should have known that his policy was effective, and immediately sought a means of defeating collection by the widow. There is an old adage concerning possession and its significance, which it is fair to assume, men in their position had probably learned about, and they decided to get possession of this policy, and Rogers' notes and other data at once, and by any means necessary, and to repudiate the policy, and they straight-way acted upon this impulse. Such conduct, we submit, could help them not at all.

12. The appellant could not under the circumstances of this case, repudiate, forfeit or cancel its policy without demand for payment of initial premium upon Rogers' personal representatives, and surrender of the policy, notes and papers which Mr. Lindberg wrongfully took from the room of the deceased, Zeno A. Rogers.

Appellants witnesses were at great pains to point out at the trial of this case, that the promissory notes taken by Rogers, or other agents, in payment of initial premiums, "were the property of these agents and not the company's property." This was emphasized again and again. And the company's right to collection of the notes was emphatically denied.

On the death of Rogers, his personal representatives were entitled to the possession of the insurance policy, and also of all other papers and documents belonging to the deceased, which Mr. Lindberg wrongfully and forcibly took.

What appellant attempted to do—acting in this regard, by its Arizona representatives, was to repudiate, cancel or rescind Rogers' policy theretofore issued; but obviously before this recission could become effective, it was essential that the appellant perform, at least two acts which they did not perform, viz:

(a) Rogers' insurance policy, together with the promissory notes, and other papers taken from Rogers' room should have been surrendered to his personal representatives.

(b) Rogers' personal representatives and the beneficiary under the policy, should have been afforded a reasonable time within which to make payment of the initial premium.

The appellant took neither of these required steps - - it attempted to take the law into its own hands and repudiate the policy. (App. St. Sec. 11, Pars. (a) to (c) Inc., ante); and this attempted repudiation or recission, was manifestly premature and of no effect. *McCulloch vs. Scott*, 13 B. Mon. (Ky.) 172, 56 *Am. Dec.* 561 and Note;

Bell vs. Campbell, 123 Miss. 1, 24 S. W. 359, 45 A. S. R. 505.

13. The wrongful seizure of Rogers' policy, notes and effects, and the Company's repudiation of all its obligations, under his policy, relieved Rogers' personal representatives and his policy beneficiary from the necessity of making any tender or offer of performance.

Considering the conduct of the Appellant, a tender of payment or an offer of performance of any kind on the part of Mrs. Rogers, or her son, would manifestly be a useless and futile act. Mr. Lindberg had seized the polily. He had declared that it was of no effect because Rogers had died. He refused to acknowledge the responsibility of his Company in any manner, and clearly informed Mrs. Rogers that the Company would not recognize the policy, and would not pay it under any consideration. The law in such an instance is very clear. - No tender or offer on the part of the personal representatives, was required. *Barney v. Bliss*, 1 D. Chip. (Vt.) 399, 12 Am. Dec., 696; *Adams v. Clark*, 9 Cush. (Mass.) 215, 57 Am. Dec. 41; *Adams Express Co. v. Harris*, 120 (Ind.) 73, 21 N. E. 340, 7 L. R. A. 214; *Cleveland, etc. R. Co. v. Anderson Tool Co.* 180 (Ind.) 453, 103 N. E. 102, 49 L. R. A., (N. S.), 749.

We submit it to be the law that Appellant's denial of the rights of the plaintiff and Appellee herein, before the institution of her suit, rendered the question of burden of proof with respect to payment of initial premium moot and unimportant; but if such misconduct and denial of rights on the part of Appellant did not eliminate the question of payment and its appertaining burden of proof - then we say in this connection, that there are

other good and sufficient reasons relieving the plaintiff and Appellee from the burden of proving payment of the initial premium, which counsel emphasizes with such repetition.

14. (a) Counsel's wrongful seizure and intrusion into Zeno A. Rogers' business affairs shifted any burdens which might have otherwise arisen under the circumstances, from the plaintiff and Appellee to the Appellant.

Where, as in this case, the Appellant took possession of Rogers' property, including his policy, promissory notes and other property, equity raises in respect of such property, a constructive trust; and constitutes the wrongdoer—in this case Mr. Lindberg, a *trustee ex maleficio*, and where as herein, the person so held as a trustee ex maleficio intermeddles with, and assumes to manage, or do anything with respect to the property wrongfully seized, he is held to become also a trustee de son tort. *Arntson v. Sheldon First Nat'l. Bank*, 167 N. W., 760, L. R. A. (1918F), 1038, *Robinson v. Pierce*, 118 (Ala.) 273, 24 So., 984, 72 A. S. R., 160, 45 L. R. A., 66; *Edwards v. Culbertson*, 111 (N. C.) 342, 18 L. R. A., 204; *Bailey v. Bailey*, 67 (Vt.) 494, 32 (Atl.) 470, 48 A. S. R. 826; *Morris v. Joseph*, 1 (W. Va.) 256, 91 Am. Dec. 386; *Garvey v. Jarvis*, 46 (N. Y.) 310, 7 Am. Rep., 335.

It will be remembered that Messrs. Lindberg and Caskey disclaimed all right or interest of the Insurance Company to the promissory notes made to Zeno A. Rogers, and seized by Mr. Lindberg. They also disclaimed any right of the Company to collect the same, and yet, *they did both*. Under the circumstances, it was the duty of the Company, and it carried the burden throughout

the trial, of fully accounting for, and of showing fully just what the Company did in the premises, and just what money was received, and how it was applied. This the Appellant did not do.

Under the circumstances, the utmost good faith was required of the Appellant as trustee ex maleficio, and as trustee de son tort, to show complete performance with utmost skill and energy in performing all the acts and things which, but for their wrongful conduct, Zeno A. Rogers' personal representatives or beneficiary, might have done and accomplished and the proper and equitable application of the moneys collected. The Company did not discharge its duty in this respect—it contented itself with showing that it apparently picked out the "cream" of Rogers' promissory notes, and abandoned and made no further effort to collect the others. It said in effect:

> "Well, under the way we handled it, our records don't show that Zeno A. Rogers ended with any credit standing to his name".

The Appellant made no effort whatever, to show what it did towards collecting these notes, or that they were uncollectible, or anything else necessary to discharge it's duty in the premises.

> **14. (b) If there was any burden upon the plaintiff and appellee under the circumstances of this case, which we deny, to show that there was payment of the initial premium or its equivalent, viz: credit arrangement, this proof was discharged by proving delivery of the policy, premature foreclosure of her rights as personal representative and beneficiary, and this burden, if any existed, then shifted to the defendant to show that the rights of the plaintiff and appellee had not been**

denied and that it had performed all trust duties which were imposed on it because of its seizure and meddling with the property of the deceased.

Delivery of the policy and the wrongful taking of it, together with Rogers' promissory notes, were established beyond question; and the circumstances fully admitted by the appellant. For these reasons, we submit the question of burden of proof, with respect to the plaintiff and appellee, is moot and unimportant.

We have previously quoted authorities as to the burden as a consequence of appellant's wrongdoing with respect to the effect of proof of delivery, but in the event such a burden were initially carried by the plaintiff, the Courts state:

> "* * *evidence is required to be established whether or not a premium or assessment was paid in accordance with the terms of the policy, or whether a *credit* was *extended* for its *payment*".
>
> 33 C. J. Sec. 858, p. 126
> *Harris vs. Sec. Life Ins. Co.*
> Ann. Case 1914 C. 648.

The appellee, as the record will show met this burden by showing, the delivery and possession of the policy, and the equivalent of payment, namely that a credit arrangement was effected as between the Agency Director and the insured, and that in pursuance thereof, the policy was duly and unconditionally delivered to the insured.

The legitimate inferences flowing from the possession of the policy are a presumption of payment. Possession of the policy by the insured was prima facie evidence of

its delivery and payment as a valid and subsisting contract.

Aetna Life Ins. Co. vs. Geher
50 Fed. (2d) 659

"Where an insurance policy is delivered without requiring payment of the premium the presumption is that a credit was intended and the policy is valid."

Brooklyn Life Ins. Co. vs. Miller
12 Wall. (U. S.) 285
20 L. ed. 398

Farnum vs. Phx. Ins. Co.
17 Am. St. Rep. 233

Under the facts and circumstances of the case, as we have previously shown, the burden in this case with respect to plaintiff and appellee's rights, and with respect to payment of premium was upon the appellant; and its evidence offered in discharge of this burden was rejected by the jury.

We submit therefore, that the plaintiff and appellee by her evidence fully met all requirements and discharged all burdens of proof incumbent upon her for the maintenance of this action.

SUMMARY

We regret that it has seemed necessary to discuss at some length what has seemed to us to be the decisive law points applicable to the material facts in this case. We will ask opposing counsel to bear some of the censure if our argument seems prolonged. The plan adopted by counsel does not, we think with all due respect to our able opponents, lend itself to a brief answer, and one of the reasons why, is because in the pattern which counsel

have followed we have found difficulty in segregating their argument as to the Appellee's right to maintain this action, and the sufficiency of her proof.

So that they might be answered in their proper relation, we have attempted to segregate questions relating to the plaintiff and Appellee's right to maintain this action, from the essential proofs required on its trial; and in our analysis we think, that we have fully established, and supported by ample authority, that because of the facts and circumstances of the case, there accrued to her, this cause of action, which she instituted, and which we think she has sustained by ample proof, to wit:

1. Rogers held an enforcible contract of insurance with the Appellant at the time of his death.

2. Because of the admitted conduct of the Appellant, there accrued to the plaintiff and Appellee herein, a right to bring this action without the performance of further acts on her part.

The suggestion of counsel's argument under this Issue, viz: That Rogers knew Lindberg could not agree as to extension of credit for first premium; that the Insurance Company was not bound by the action of its Agency Director, and the authorities cited in support of these two propositions, have we think, been fully met, including all "Hornbook Law" concerning the actual methods and customs of doing business.

We believe further that we have shown that if Appellant has not received payment of its first premium, it is because of its high-handed conduct in making such payment impossible. The original and influencing conclusion reached by the Appellant acting in this regard by

its Arizona officials, is strikingly revealed in Lindberg's statement, in substance, to Mrs. Rogers:

> "Everything would have been alright and the policy would have been good, had your husband lived but his death ended everything".

In this conclusion we submit that Mr. Lindberg was mistaken—Rights such as Zeno A. Rogers possessed do not die with him, even though he cannot come into Court and speak for himself—the law protects him and those who are justified in looking to him for care and sustenance. Upon this theory, as stated, we submit the right of Mrs. Rogers to maintain this action is fully established.

APPELLANT'S OBJECTION TO INSTRUCTIONS

Before considering separately the issues under this feature of the case, it seems proper to point out that Appellant's objections are cognate parts of its theory of the case, viz:

> That regardless of the public's reliance on the actual customs and practices of the Company, and regardless of the fact that it constantly delivered its policies in the regular course of business, which policies, admittedly, became effective on delivery without the pre-payment of the initial premium - yet, no policy of the Company could become effective until the first premium was paid in cash. That it would have been better from a security standpoint, if the Company had held Rogers' policy in its Phoenix Office until the first premium had been paid, and that Mr. Caskey was careless in mailing the policy to Rogers, and that such carelessness was a "mistake" from which it should be relieved. Further, that unless Mrs. Rogers could show there had been an actual payment of the init-

> ial premium in cash before the policy was delivered, she was not entitled to recover under any conditions. That the manner and method by which Mr. Lindberg and Mr. Caskey conducted the Company's business in Arizona, and regardless of their actions or conduct in this instance - no matter what else might have been established by the evidence, in no event could the Company be held liable, unless the Appellee showed the payment of the initial premium in cash.

The vice of this theory, as we see it, is that it seeks to completely ignore other facts and circumstances of at least as great importance as this initial premium payment; begs the question in many instances; and rests entirely upon technicalities.

ISSUE IV, V AND VI

Appellant's objection to that part of the Court's instruction which it calls Plaintiff's "Instruction No. 1", (Tr. Par. 1, Page 224) is because it says that the Court in substance told the jury:

> That if the Appellant knowingly held Lindberg out to the world as having authority to waive payment of the first premium, and if Rogers believed him to have such authority, the Appellant would be bound by its conduct.

Appellant says this instruction was faulty because there was no evidence that Lindberg was so held out to the public, or that Rogers was thereby misled; that the instruction was prejudicial to the Appellant. How, it does not say.

This objection again begs the question. The Appellant's witness, Mr. Caskey, admitted - and other evidence

showed, that under the administration of the Arizona Office, by Mr. Lindberg and Mr. Caskey, and the regular practices and customs thereof, Insurance Policies were constantly delivered to the insured without the pre-payment of the initial premium, in the regular course of business, and in complete disregard of what counsel asserts were "restrictive provisions" of it's various documents.

Obviously - with abundant evidence in the record in support thereof, it was a legitimate and proper duty of the jury to decide from the facts adduced - Whether the Company had so held out to the general public, its Agency Director Lindberg, as having authority to deliver - under similar circumstances similar policies, without the pre-payment of the initial premium; and whether from such circumstances and observance, Zeno A. Rogers, was justified in believing that the said Lindberg had authority to cause Zeno A. Rogers' policy to be delivered in accordance with the constant practice of the Company, without the pre-payment of the initial premium.

We believe these questions were properly submitted, and that the instruction properly states the law. The questions submitted were properly related to the evidence, and obviously state an elementary principle of law.

Branson Inst. to Juries 182

Fore v. Hitson, 8 S. W. 292

Smith v. Wise, 58 Ill., 141

Haskell v. Starbird, 25 N. E. 14

We have heretofore pointed out, that these so-called "restrictions" were confined in their operation to solic-

iting and not general agents of the Appellant, and to premiums other than the initial premium.

The undisputed evidence is that the Company constantly, in doing a substantial portion of its business, makes a common practice and custom of delivering its policies to the insured without pre-payment of the initial premium; and certainly, the observance of this fact by Rogers, despite any notice he may have had about technical restrictions with respect to other premiums, might well justify his believing that Lindberg had authority to likewise deliver him a policy under a credit arrangement and without the pre-payment of the initial premium.

This question, we submit, was fairly presented to the jury, and that no prejudice was thereby inflicted upon the Appellant.

Appellant's objection to the next instruction of the Court, which it denominates as Plaintiff's Instruction No. 2, (Tr. Par. 2, Page 224), and admits is a correct statement of abstract law, is that there was no evidence that would justify its being given.

This instruction is but a statement, in a different aspect, of the law and facts relating to the authority, or apparent authority, of an agent, and the resulting consequences thereof where innocent third parties are concerned. The record fully justifies the propriety of giving this instruction, and Mr. Caskey's statement concerning the manner in which the Company did business - even if standing alone, furnished a factual foundation for the same.

The facts in the case of *Wells v. Prudential Insurance Company*, 239 (Mich.) 92, 214, N. W. 308, quoted by

the Appellant, and the cases on which the decision in that case was based, are readily distinguishable from the instant case. In that case the policy holder's claims were based upon an alleged parole contract. In the instant case the customs and practices of the Company, and the credit agreement, consistent with these customs and practices, are made the foundation of the Appellee's claims, and justify the question submitted by the instructions.

It is to be borne in mind, that because of the wrongful conduct of the Appellant's Agency Director, the customary burdens of proof were fixed or constant. That but for the wrongful conduct of the Appellant's General Agents, the initial premium on the Rogers policy might well have, or may have been paid in full. Rogers in common with other soliciting agents of the Company, had an established account in the records of the Appellant, through which his dues to the Appellant, might well have been paid in full—had there been no seizure of his property or intrusion on his business—All of these matters and things were before the jury, and all combined, went to make up the record in the case, at the time these instructions were given. To say that the instructions should be fashioned and based only in such manner as to submit isolated, favorable and technical questions to the jury, is not a correct statement of the law. The instruction correctly stated the law.

Branson Inst. to Juries 182

Hanover Nat'l. Bank v. Amer. Dock Co.,
43 N. E. 72, 51 Amer. State Rep., 721.

Ins. Co. v. Norton, 96 U. S., 234

Manufacturers, etc. Co. v. Armstrong,
45 Ill., App., 217.

U. S. Life Ins. Co. v. Lesser,
28 So. Reps., 646.

Under Issue V, considered in connection with Issue IV, counsel say that Instruction No. 3, (Tr. 225, Par. 3,) is objectionable in that it is not clear and does not clearly state the law. Counsel admit that the Appellee's showing that the policy had been delivered to her husband in his lifetime raises a presumption that the initial premium thereon was paid, and admits that it then became the duty of the Appellant to overcome this proof of possession by some other fact or occurence. But at this point Appellant again envisions what it considers its own evidence only.

Appellant attempted to overcome the proof of posession by certain facts which it concludes constituted a mistake from which the Court would relieve it of the consequences of the delivery which it had made - In no shape, manner or form was there any intimation of any defense that the policy was delivered to Rogers in his character as an agent, rather than as a policy applicant. This suggestion as we have previously shown first appears in counsel's Brief. Appellant stood entirely on what it's showing was in regard to the circumstances under which the policy was delivered, and nothing else. Now, the record also showed facts that would disprove any claim of mistake, - evidence which showed that Rogers' policy was regularly delivered to him with full intention so to do. This matter has heretofore been discussed fully under Appellant's Issue I.

The Court's subsequent instruction, (Tr. 227, Par. 2), told the jury that delivery was a matter of intention, and that if Zeno A. Rogers' policy had been sent to him without any intent on the part of the Appellant to part with its possession, then such delivery would be considered a mistake, and the jury's finding should be for the Ap-

pellant. There are no conflicts in the instructions, and the entire instructions should be construed together. Whatever the Court instructed the jury concerning the effects of a "holding out" must be read in the light of the entire instructions, and it will be observed that the Court instructed the jury clearly and pointedly as to the burden of proof carried by the plaintiff, (Tr. 227, Pars. 3 & 4).

The Court points out with reference to the burden of the Appellant to overcome the presumptions from the prima facie showing, with respect to possession of Rogers' policy, that if the jury believe this policy had been sent by the Appellant to Rogers, by mistake, that the plaintiff could not prevail. That was the only legal reason offered by the Appellant on the trial of this case to overcome the presumption arising from possession of the policy, and certainly, the instruction, plainly and fairly submitted for the consideration of the jury, Appellant's contentions in this regard, and the authorities so hold. (Abbott, Tr. Ev. Vol. 2, 1242). *Page v. Virginia Life Ins. Co.* 42 SE 543; *Rayburn v. Pa. Cas. Co.* 50 SE 762, 107 Am. St. Rep. 548; *Home Ins. Co. v. Gilman et al* 112 Ind. 7; *De Frece v. Nat'l. Life Ins. Co.* 32 NE 556; *Pointer v. Ind Life et al* 30 NE 876; *Michigan Mut. Life Ins. Co. v. Custer* 128 Ind. 255, 46 At. 1005; *Mauch v Merchants etc.* 54 At 952; *Washburn v. Union Cent. Life Ins. Co.* 39 So. Reps. 1011.

Proof Features Under This Issue

We have shown under Propositions 9 and 10, ante, in our argument under this Issue that the rights of Zeno A Rogers' personal representatives—and Mrs. Rogers as beneficiary, could not be foreclosed until they were first

afforded an opportunity, and a reasonable time to pay the initial premium due under the policy.

The proof that this opportunity and this reasonable time had been given to Mrs. Rogers, the Appellee, was under the circumstances of the case, a burden falling upon the Defendant and Appellant and not upon the Plaintiff or the Appellee.

Counsel's suggestion, therefore, with respect to burden of proof, and that the Appellee must fail herein because she did not prove with greater certainty payment of the initial premium, does not, we think, state the law applicable to this case. In the consideration of counsel's charge of the burden of proof, there are other major propositions of law aiding the Appellee, which counsel have overlooked.

ISSUE VI

Under Issue VI, Appellant complains of what it calls Plaintiff's Instruction No. 4, (Tr. 226, Par. 2), because of their objection to a part of a sentence therein.

Rogers' insurance policy, his application and a duplicate of the alleged "Permanent Aviation Clause" were permanently attached together, and introduced in evidence. It is admitted by the Appellant's witnesses that when Rogers accepted the policy he accepted this Permanent Aviation Clause, thus supplementing his express waiver of all insurance on account of aviation accidents.

The evidence also showed that if there was an "original sheet," of the Permanent Aviation Clause a duplicate of which was signed for him by the Company, and attached to his policy—such original was never transmitted from the Home Office to the Local Office, and

that the Local Office did not have such original paper, and never presented or mentioned anything concerning it to Rogers, (App. St. Sec. 6, Pars. (a), (d) & (e); Sec. 7, Pars. (a) & (b).)

Considering the facts of the records there is no doubt that the instruction was properly given, and correctly stated the law.

Bloom v. Pacific Mut. Life Ins. Co.
259 Pac. 496.

Counsel will, no doubt, admit that this case should not be reversed for inconsequential technical errors which they are unable to show resulted in any injury to the appellant. Every legitimate presumption is in favor of the Court below, and it will be presumed that instructions given were justified by the evidence. If the instructions taken as a whole were substantially correct and no misleading of the jury appears, the judgment will not be disturbed. The judgment will not be disturbed because separate instructions do not contain all conditions and limitations which might be affixed thereto. Instructions are to be read and considered as a whole, and the fact that when taken separately, some of them may fail to enunciate in precise terms and with legal accuracy propositions of law, does not necessarily render them erroneous, but it is sufficient if all the instructions taken together give to the jury a fair and understandable notion of the law regarding the point discussed. *People vs. McCauley*, 1 Calif., 379; *Columbia Heights Realty Co. vs. Rudolph*, 217 U. S. 547, 30 Sup. Ct. Rep. 581, 54 L. Ed. 877; *People vs. Doylle*, 48 Calif. 85; *Holoway vs. Dunham*, 170 U. S. 615, 18 Sup. Ct. Rep. 784, 42 L. Ed. 1165; *People vs. Turcott*, 65 Calif. 126, 34 Pac. 618; *Gamachae vs. Piquignot*, 16 How. 451, 14 L. Ed. 1012; *People vs. Mc-*

Curdy, 68 Calif. 576, 10 Pac. 207; *Stephenson vs. So. Pac. Co.*, 102 Calif. 143, 34 Pac. 618.

CONCLUSION

Considering the mercenary, highhanded and arbitrary conduct of the Company's chief representatives, as revealed by the record, then for the Appellant to assert that the judgment of the District Court is unjust, smirks of hypocrisy.

There were no written rules or regulations in the local office, or elsewhere, governing the delivery of Rogers' policy. Mr. Caskey attempted to formulate the rules as he went along. His January 15, 1940, request for a report shows that he knew all the time that Rogers held his own policy, and he did not try to get it back by his letter of January 23, 1940, because of any mistake, but because he thought Rogers wasn't making payment quick enough. The suggestion of mistake, was a mere after-thought—Caskey did just what he intended to do, and what the circumstances dictated and required in mailing Rogers' policy. The fact that he afterwards had a better thought, or subsequently changed his mind is immaterial.

To say, as Appellant does, that the record did not disclose a credit arrangement, is to shut one's eyes to the patent facts of this case. The Company delivered some 24 or 25 policies on the credit of Mr. Rogers, and looked to him for payment of the first premiums thereon, and then to say that it could not or did not deliver his own policy on credit, under precisely the same operating plan, is thoroughly disproved by the record.

Mr. Zeno A. Rogers applied for a policy, signed all

necessary applications, invoked the Company's usual credit plan, and received his policy in the regular manner, and as Mr. Lindberg says: "had he lived, everything would have worked out alright", - - but the main reason it did not "work out alright" was because Lindberg forcibly entered Rogers' room, purloined his policies and notes, denied Rogers' personal representatives, any reasonable opportunity to pay the premium, repudiated his company's policy, took the Rogers' notes and applied the proceeds therefrom, as he saw fit, and to the disadvantage of Rogers.

The jury heard all the evidence, judged all the parties, saw them, and surveyed them; considered the whole situation under proper instructions from the Court, and decided that Rogers' dependents should not be deprived of their just dues, and that the Company should be held to its contract in the same manner as it would be responsible under its credit arrangement, or plan of operating, for a policy delivered to any other assured.

Respectfully submitted,

DOUGHERTY and CHANDLER,

M. J. Dougherty

John Francis Connor